Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors

COURT OF APPEAL(PUTRAJAYA) — CIVIL APPEAL NO W-02–1158 OF 2005
GOPAL SRI RAM, ZAINUN ALI AND HASAN LAH JJCA
14 JULY 2008

Companies and Corporations — Members' rights — Oppression — Whether affairs of joint venture company conducted in a manner oppressive to respondent — Petitions for relief tried together — Respondent's petition allowed by High Court — Appeal against order — Whether trial judge had failed to judicially appreciate evidence in respect of each item of alleged oppressive conduct — Whether appellate court can interfere with finding of trial judge on oppression which is a question of fact

Companies and Corporations — Winding up — Petition — Allegations of oppressive conduct — Whether allegations of oppressive conduct constitute grounds for moving a petition under s 181 of the Companies Act 1965 — Whether breach of pre-emptive provision in joint venture agreement constitutes grounds for moving a petition under s 181 of the Companies Act 1965

United Engineers (Malaysia) Bhd ('UEM') and Genisys Intergrated Engineers Pte Ltd ('GIE') entered into a joint venture agreement, titled the Shareholders Agreement (the agreement), for both these companies to jointly venture into and exploit the mechanical and electrical engineering market in Malaysia. A private limited company called United Genisys Sdn Bhd ('UEG') was incorporated as the vehicle to carry out this joint venture. Pursuant to the terms of the agreement, UEM held 51% of the shares in UEG and GIE held the remaining 49%. The agreement defined the roles of UEM and GIE in the joint venture, and made clear that the management and control of UEG was vested in its board of directors. However, the day to day management of its business and affairs were delegated to one Seow Boon Cheng (Seow), who was appointed the CEO of UEG. Seow was also the managing director and majority shareholder of GIE. However, although Seow was GIE's nominee on UEG's board, UEM and its management placed great trust in Seow to manage UEG with a minimum level of interference either from UEM or its

nominee directors. When UEG commenced operations it was awarded a considerable amount of contract works by UEM and its related companies. In 1997 when there was a global financial crisis, UEM decided to dispose of its non-core businesses and since it considered UEG to be a non-core business, it set about identifying a buyer to dispose of its shares in UEG. It then proceeded to enter into a sale and purchase agreement to sell its 51% shareholding in UEG to Nova Nusantara for RM1.02m with the added incentive that 'listing of UEG is to be attempted within three years of the takeover'. However under cl 12.3 of the agreement, a member intending to transfer its shares, should offer them first to the existing members. UEG should have therefore first offered its shares in UEG to GIE. When GIE learned about this it wrote to UEM reminding the latter about cl 12.3 of the agreement and expressing its willingness to purchase from UEM its UEG shares on the same terms as those proposed by Nova Nusantara with one difference, that was, that the duty on GIE to take steps to have UEG listed would expire at the end of the three years after the sale or if the attempt at listing failed. In response UEM offered to sell its UEG shares to GIE for a sum of RM10.71m and the purchase price was to be paid in full upon signing the sale and purchase agreement. It would appear that UEM's offer to GIE was less favourable than the memorandum of understanding that it had with Nova Nusantara. Thereafter for a period of two years there were long and protracted negotiations between UEM and GIE about the sale of the shares. During this period the relationship between the joint adventurers also deteriorated with a threat from UEM to wind up UEG. The exchange of correspondence between UEM and GIE showed that UEM had lost interest in the joint venture after having taken the decision to rid itself of its shares in UEG and even went so far as to take the position that it had the prerogative to determine whether UEG would survive or be wound up. When there was a total breakdown of relations between UEM and GIE, litigation was commenced with each party presenting its petition for relief under s 181 of the Companies Act 1965 ('the Act') and each contending that the other had acted oppressively. UEM's case was that Seow conducted the affairs of UEG with a lack of probity and thereby oppressed UEM as a shareholder. UEM submitted that Seow had performed acts without proper board authorisation and kept UEM in the dark about certain transactions and payments. The transactions that UEM made reference to as oppressive conduct were the 'Hanoi Sheraton project', which was a sub-contract awarded to UEG, from which payments to be received by UEG were allegedly diverted by Seow to GIE; the transfer of RM1m from UEG's account at Mayban Finance Bhd to GIE's bank account at Maybank Bhd by Seow and GIE; the payment of RM50,000 to an ex-employee of UEG by Seow which showed how the funds of UEG were misappropriated or misused

A B C D E F G H I

by those having control of UEG; payments by Seow to a company called Metronic Engineering Sdn Bhd ('Metronic'), in which he held 62% of the shares, without declaring his interest in Metronic to UEG's board; inter-company payments instituted by Seow which were designed to circumvent the system of joint approval of payments which was in place in UEG; and finally the fact that management of UEG was lacking in probity because UEG's account for the year ending 31 December 1998 had not been audited and because UEM was denied access to UEG's accounting documents. The petition by GIE was based on those matters that transpired after UEM's decision to withdraw from the joint venture. The main grounds of complaint were first, that UEM acted in breach of the shareholders agreement by dealing with Nova Nusantara and second that UEM starved UEG of funds so as to eventually have it wound up. GIE also submitted that Seow did the acts complained of to keep UEG alive and that UEM had acquiesced to those transactions that it now complained about. The two petitions were tried together in the High Court and the court dismissed GIE's petition but granted UEM's petition. The High Court also ordered UEG to be wound up. This was GIE's appeal against the court's decision to dismiss its petition and the court's order to wind up UEG. GIE's appeal in respect of UEM's petition was grounded principally on the submission that the learned judge failed to judicially appreciate the evidence in respect of each item of the alleged oppressive conduct.

Held, setting aside the order in respect of UEM's petition but affirming the order in respect of GIE's petition with liberty to apply to the High Court on the carriage of the orders made:

(1) (per **Gopal Sri Ram JCA**) Although the question of whether there is oppression in a given case is a question of fact, in arriving at his conclusions of fact a judge hearing a petition under s 181 of the Act must not consider events in isolation but as part of a consecutive story. Unfortunately, in his judgment the trial judge did not deal with GIE's case as presented to him and as supported by the chain of events forming the consecutive story leading to the heart of the dispute between the parties. In fact, a careful reading of the judgment disclosed that the judge dealt with the case on the basis of isolated incidents relied on by UEM as constituting oppression. The judge's failure to adequately address GIE's case was a matter of serious concern that certainly lends support to GIE's complaint that there had been no judicial appreciation of the evidence. Nowhere in the examination of the individual complaints of each petitioner or in the discussion of the law relating to s 181 of the Act, was there any reference to the approach to be taken when evaluating a complaint of oppression made pursuant

to the said s 181. This omission had led to the judge failing to properly evaluate the facts presented to him as part of a consecutive story when deciding whether there was oppression in the particular circumstances of this case. Therefore, although it is well settled law that an appellate court will not interfere with the decision of a trial judge unless satisfied that his or her findings are plainly wrong, this error in approach by the trial judge had rendered this judgment vulnerable to appellate correction (see paras 13–14 & 16–17).

(2) (per **Gopal Sri Ram JCA**) The documentary evidence showed that UEG's board knew all about the subcontract and the payments that were to be made to GIE in respect of the Hanoi Sheraton project. This exposed UEM's allegations made in support of this ground of complaint to be completely lacking in substance. There was therefore merit in GIE's complaint that there was no judicial appreciation of the evidence on this point (see paras 26 & 28).

(3) (per **Gopal Sri Ram JCA**) There was absolutely no basis for the judge to come to the conclusion that RM1m was misappropriated from UEG's account by Seow and GIE. The undisputed facts relevant to this ground of complaint showed that all cheques drawn on UEG's account required two signatures ie one by the GIE representative and the other by UEM's nominated signatory and the cheque in question was not signed by Seow but by one Azni Amran who was nominated by UEM to sign all cheques drawn on UEG's account. Therefore it would appear that the judge's analysis of the evidence was confined to only certain portions of Seow's evidence without considering the other evidence that overwhelmingly pointed to Seow's innocence. It was therefore clear that the judge did not properly evaluate or appreciate the totality of the evidence on this part of the case and that his finding on this ground of complaint was fatally flawed (see para 30).

(4) (per **Gopal Sri Ram JCA**) The judge's finding that a cheque for RM50,000, which was made out to an ex-employee of UEG, on the instruction of Seow as being another instance of how funds of UEG were misappropriated or misused by those having control of UEG was a serious misdirection on the facts. This was because independent, contemporaneous documentary evidence showed that the money never left UEG (see para 32).

(5) (per **Gopal Sri Ram JCA**) The judge further misdirected himself on the facts and the law when evaluating the facts and evidence. Although Seow testified that he had disclosed his interest in Metronic to UEM nominated directors of UEG, the said directors were not called as

witnesses to clarify the position. It was a serious miscarriage of justice to put to a witness that he or she did not disclose material facts to named persons and then omit to call these persons with no offer of an explanation for the omission. This and other omissions by the judge resulted in his failure to properly appreciate Seow's evidence in its totality and to detect the lack of substance in the allegations made by UEM. The misdirection in law arose when the judge misdirected himself in his application of s 131 of the Act. His direction upon the construction of s 131 of the Act was against the line of authorities that had interpreted the section and therefore constituted a misdirection in law (see paras 38, 41 & 43–44).

(6) (per **Gopal Sri Ram JCA**) Although the judge was highly critical of GIE and Seow, he appeared to have completely overlooked UEM's own participation in the inter-company transactions. This duality of approach to the evaluation of evidence constituted a serious misdirection resulting in a miscarriage of justice, which warranted appellate interference (see para 47).

(7) (per **Gopal Sri Ram JCA**) An objective viewing of the accounts showed that UEG was in a financially straitened position principally because of monies owed to it by UEM's subsidiaries and its group of companies. However UEM placed the blame entirely on GIE and the judge accepted that to be the case without a proper appreciation of the evidence. Thus, the finding that Seow conducted the management of UEG's financial affairs in a manner wholly lacking probity could not stand in the light of independent contemporaneous documentary evidence and was against the probabilities of the case (see para 49).

(8) (per **Gopal Sri Ram JCA**) Taking into account the whole of the evidence, including the undisputed contemporaneous documents, none of the grounds of complaint raised by UEM and dealt with by the High Court were substantiated. UEM had therefore failed to establish a case of oppression under s 181 of the Act and its petition was hereby dismissed (see para 51).

(9) (per **Gopal Sri Ram JCA**) The matters raised by GIE do not constitute grounds for moving a petition under s 181 of the Act and therefore, for reasons different from those given by the High Court, GIE's petition was also dismissed (see para 52).

(10) (per **Zainun Ali JCA**) If there has been a breach of the pre-emption provisions obviously a shareholder entitled to those pre-emption benefits, has a cause of action to protect his interest. In the present

appeal, UEM not only acted in breach of the pre-emption provisions but it went a step further by asking GIE to waive those rights under the shareholders agreement. In addition UEM offered GIE the shares on much less favourable terms than it did to Nova Nusantara. UEM had thereby treated its partner GIE a lot less fairly than it did a third party, Nova Nusantara (see paras 65–68).

[Bahasa Malaysia summary

United Engineers (M) Bhd ('UEM') dan Genisys Intergrated Engineers Pte Ltd ('GIE') memasuki perjanjian usaha sama, bertajuk Perjanjian Pemegang Saham (perjanjian tersebut), untuk kedua-dua syarikat ini untuk berusaha sama meneroka dan mengeksploitasi pasaran kejuruteraan mekanikal dan teknikal di Malaysia. Syarikat persendirian bernama Genisys Sdn Bhd ('UEG') diperbadankan sebagai jentera untuk mengendalikan usaha sama ini. Berikutan terma-terma perjanjian tersebut, UEM memegang 51% daripada syer di dalam UEG dan GIE memegang bakinya sebanyak 49%. Perjanjian tersebut menetapkan peranan-peranan UEM dan GIE di dalam usaha sama tersebut, dan menjelaskan bahawa pengurusan dan kawalan UEG diletakhakkan kepada lembaga pengarahnya. Walau bagaimanapun, pengurusan harian perniagaannya dan hal ehwal telah diberikan kepada Seow Boon Cheng (Seow), yang dilantik menjadi ketua pegawai eksekutif (KPE) UEG. Seow juga adalah pengarah urusan dan pemegang saham majoriti GIE. Walaupun Seow adalah wakil GIE di dalam lembaga UEG, UEM dan pengurusannnya meletakkan kepercayaan sepenuhnya kepada Seow untuk menguruskan UEG dengan campur tangan yang minima sama ada daripada UEM atau wakil pengarah-pengarahnya. Apabila UEG memulakan operasi ia diawardkan banyak kerja-kerja kontrak oleh UEM dan anak-anak syarikatnya. Pada 1997 apabila terdapat krisis kewangan global, UEM memutuskan untuk menjual perniagaan-perniagaan bukan terasnya dan memandangkan ia mempertimbangkan UEG sebagai perniagaan bukan teras, ia terus mengenalpasti pembeli untuk menjual syernya di dalam UEG. Ia kemudiannya meneruskan untuk memasuki perjanjian jual beli untuk menjual pemegangan saham UEGnya sebanyak 51% kepada Nova Nusantara sejumlah RM1.02j dengan insentif yang ditambah bahawa 'listing of UEG is to be attempted within three years of the takeover'. Walau bagaimanapun di bawah klausa 12.3 perjanjian tersebut, seorang ahli yang berniat untuk memindah syernya, patut menawarkannya dahulu kepada ahli-ahli yang ada. UEG oleh itu sepatutnya menawarkan dahulu sahamnya di dalam UEG kepada GIE. Apabila GIE mengetahui mengenai perkara ini, ia menulis kepada UEM mengingatkan mereka mengenai klausa 12.3 perjanjian tersebut dan menyatakan kesediaannya untuk membeli daripada UEM saham UEGnya atas terma yang sama seperti yang dicadangkan oleh Nova

Nusantara dengan satu perbezaan, iaitu, bahawa tugas GIE untuk mengambil langkah-langkah untuk menyenaraikan UEG akan tamat pada akhir tahun ketiga selepas jualan tersebut atau jika percubaan untuk menyenaraikan gagal. Di dalam menjawab UEM menawarkan untuk menjual syernya kepada GIE untuk sejumlah RM10.71j dan harga belian hendaklah dibayar penuh selepas menandatangani perjanjian jual beli tersebut. Tawaran UEM kepada GIE nampak seperti tidak menarik daripada memorandum persefahaman yang ia telah tawarkan kepada Nova Nusantara. Kemudiannya, untuk tempoh selama dua tahun terdapat perundingan yang lama dan berpanjangan di antara UEM dan GIE mengenai jualan sahamnya. Dalam masa tempoh ini perhubungan di antara kedua-dua pihak juga menjadi semakin merosot dengan ancaman daripada UEM untuk menggulung UEG. Pertukaran surat menyurat di antara UEM dan GIE menunjukkan bahawa UEM telah hilang minat di dalam usaha sama selepas mengambil keputusan untuk menjual sahamnya di dalam UEG dan berlanjutan sehingga membuat keputusan bahawa ia mempunyai prerogatif untuk menentukan sama ada UEG boleh *survive* atau digulung. Apabila terputusnya hubungan di antara UEM dan GIE, litigasi dimulakan dengan setiap pihak mengemukakan petisyennya untuk relief di bawah s 181 Akta Syarikat 1965 ('Akta tersebut') dan setiap berhujah bahawa pihak yang lain bertindak secara menindas. Kes UEM' adalah bahawa Seow menjalankan hal ehwal UEG dengan tiada kejujuran dan oleh itu menindas UEM sebagai pemegang saham. UEM berhujah Seow telah melaksanakan tindakan tanpa kebenaran lembaga yang betul dan tidak memberitahu UEM mengenai transaksi dan pembayaran tertentu. Transaksi yang dirujuk oleh UEM sebagai menindas adalah 'projek Hanoi Sheraton', yang mana adalah subkontrak yang diawardkan kepada UEG, daripada mana pembayaran akan diterima oleh UEG didakwa dipindahkan oleh Seow kepada GIE; pindahan RM1j daripada akaun UEG di Mayban Finance Bhd kepada bank akaun GIE di Maybank Bhd oleh Seow dan GIE; pembayaran RM50,000 kepada bekas pekerja UEG oleh Seow yang menunjukkan bagaimana dana UEG dilesapkan atau disalah guna oleh mereka yang mengawal UEG; bayaran oleh Seow kepada syarikat yang bernama Metronic Engineering Sdn Bhd ('Metronic'), dalam mana dia memegang sebanyak 62% sahamnya, tanpa mengisytiharkan kepentingannya di dalam Metronic kepada lembaga UEG; bayaran dalaman syarikat yang dibuat oleh Seow yang direka untuk memintasi sistem kebenaran bersama terhadap pembayaran yang ditetapkan di dalam UEG; dan akhirnya fakta bahawa pengurusan UEG tidak jujur kerana akaun UEG untuk akhir tahun 31 Disember 1998 tidak diaudit dan oleh kerana UEM dinafikan untuk melihat kepada dokumen akaun UEG. Petisyen oleh GIE adalah berdasarkan fakta tersebut yang berlaku selepas keputusan UEM untuk keluar daripada usaha sama tersebut. Alasan utama aduan adalah pertamanya, bahawa UEM bertindak melanggari perjanjian

pemegangan saham tersebut dengan berurusan dengan Nova Nusantara dan keduanya bahawa UEM membiarkan UEG kehabisan wang supaya akhirnya dapat menggulungnya. GIE juga berhujah bahawa Seow telah melakukan tindakan yang diadukan supaya UEG dapat beroperasi dan bahawa UEM telah bersetuju kepada transaksi-transaksi tersebut yang sekarang ini diadukan. Kedua-dua petisyen tersebut didengar bersama di Mahkamah Tinggi dan mahkamah menolak petisyen GIE tetapi membenarkan petisyen UEM. Mahkamah Tinggi juga memerintah UEG digulung. Ini adalah rayuan GIE terhadap keputusan mahkamah untuk menolak petisyennya dan perintah mahkamah untuk menggulung UEG. Rayuan GIE berkaitan petisyen UEM adalah berdasarkan terutamanya atas penghujahan bahawa hakim yang bijaksana gagal secara kehakiman untuk menilai keterangan berkaitan setiap perkara yang didakwa tindakan menindas.

Diputuskan, mengenepikan perintah berhubung petisyen UEM tetapi mengesahkan perintah berhubung petisyen GIE dengan kebebasan untuk memohon kepada Mahkamah Tinggi berkaitan perintah-perintah yang dibuat:

(1) (oleh **Gopal Sri Ram HMR**) Meskipun persoalan sama ada terdapat penindasan dalam kes yang diberikan adalah persoalan fakta, dalam membuat kesimpulannya tentang fakta hakim yang mendengar petisyen di bawah s 181 Akta tidak patut mengambilkira peristiwa-peristiwa secara berasingan tetapi sebagai sebahagian daripada cerita yang berturut-turut. Walau bagaimanapun, dalam penghakimannya hakim perbicaraan tidak mengendalikan kes GIE seperti yang dikemukakan kepadanya dan seperti yang disokong oleh rantaian peristiwa-peristiwa yang membentuk cerita berturutan membawa kepada isu pertikaian antara pihak-pihak. Bahkan, pembacaan teliti penghakiman menunjukkan bahawa hakim mengendalikan kes atas dasar peristiwa-peristiwa berasingan yang UEM bergantung kepada sebagai membentuk penindasan. Kegagalan hakim untuk mengutarakan sewajarnya kes GIE adalah suatu yang serius yang boleh menyokong aduan GIE bahawa tiada kesedaran kehakiman tentang keterangan tersebut. Tiada mana-mana dalam pemeriksaan aduan-aduan setiap pempetisyen atau dalam perbincangan undang-undang berkaitan s 181 Akta, terdapat rujukan kepada pendekatan yang diambil semasa menilai aduan penindasan yang dibuat menurut s 181 tersebut. Peninggalan ini membawa kepada hakim yang gagal meneliti sewajarnya fakta-fakta yang dikemukakan kepadanya sebagai sebahagian daripada cerita berturutan apabila

memutuskan sama ada terdapat penindasan dalam keadaan tertentu kes ini. Oleh itu, meskipun ia adalah undang-undang tetap bahawa mahkamah rayuan tidak boleh campur tangan dengan keputusan hakim perbicaraan kecuali berpuas hati bahawa penemuannya jelas salah, kesilapan ini secara pendekatan hakim perbicaraan telah mengakibatkan penghakiman ini perlu dibetulkan oleh mahkamah rayuan (lihat perenggan 13–14 & 16–17).

(2) (oleh **Gopal Sri Ram HMR**) Keterangan dokumentar menunjukkan bahawa lembaga UEG mengetahui semua tentang subkontrak dan bayaran-bayaran yang dibuat kepada GIE berhubung projek Hanoi Sheraton. Pengataan-pengataan UEM ini dibuat bagi menyokong alasan aduan ini tidak mempunyai asas langsung. Oleh itu terdapat merit dalam aduan GIE bahawa tiada penilaian kehakiman terhadap keterangan untuk isu ini (lihat perenggan 26 & 28).

(3) (oleh **Gopal Sri Ram HMR**) Tiada asas langsung untuk hakim mencapai kesimpulan bahawa RM1j itu telah dilesapkan daripada akaun UEG oleh Seow dan GIE. Fakta-fakta yang tidak dipertikaikan yang relevan untuk alasan aduan ini menunjukkan bahawa kesemua cek-cek yang dibuat atas akaun UEG memerlukan dua tandatangan iaitu satu oleh wakil GIE dan satu lagi oleh penandatangan yang dilantik dan cek yang dipersoalkan tidak ditandatangani oleh Seow tetapi oleh Azni Amran yang telah dilantik oleh UEM untuk menandatangani semua cek-cek yang dibuat atas akaun UEG. Oleh itu ia kelihatan bahawa analisis hakim tentang keterangan itu terhad hanya kepada bahagian tertentu keterangan Seow tanpa mengambilkira keterangan lain yang jelas menunjukkan ketakbersalahan Seow. Oleh itu ia adalah jelas bahawa hakim tidak meneliti sewajarnya atau menyedari keseluruhan keterangan dalam bahagian kes itu dan bahawa penemuannya atas alasan aduan ini adalah salah (lihat perenggan 30).

(4) (oleh **Gopal Sri Ram HMR**) Penemuan hakim bahawa cek untuk RM50,000 yang dibuat kepada bekas pekerja UEG, atas arahan Seow sebagai satu lagi peristiwa bagaimana wang UEG dilesapkan atau disalahgunakan oleh mereka yang mempunyai kawalan terhadap UEG merupakan salah arah serius fakta-fakta. Ini adalah kerana keterangan dokumentar berasingan, semasa menunjukkan bahawa wang tersebut tidak pernah keluar daripada UEG (lihat perenggan 32).

(5) (oleh **Gopal Sri Ram HMR**) Hakim seterusnya telah salah arah atas fakta dan undang-undang apabila meneliti fakta dan keterangan. Meskipun Seow memberi keterangan bahawa dia telah mendedahkan

kepentingannya dalam Metronic kepada pengarah-pengarah UEM yang dilantik oleh UEM, pengarah-pengarah tersebut tidak dipanggil sebagai saksi-saksi untuk menjelaskan kedudukan. Ia merupakan kesilapan keadilan untuk mengatakan saksi bahawa dia telah atau tidak menunjukkan fakta material untuk mereka yang dinamakan dan kemudian tidak memanggil mereka tanpa sebarang penjelasan untuk peninggalan itu. Ini dan peninggalan lain oleh hakim telah mengakibatkan kegagalannya untuk menilai keterangan Seow sewajarnya secara keseluruhannya dan untuk mengesan kekurangan asas dalam pengataan-pengataan yang dibuat oleh UEM. Salah arah dalam undang-undang timbul apabila hakim telah salah arah dalam permohonannya di bawah s 131 Akta. Arahannya terhadap pentafsiran s 131 Akta adalah berdasarkan autoriti-autoriti yang telah mentafsir seksyen itu dan oleh demikian membentuk salah arah dalam undang-undang (lihat perenggan 38, 41 & 43–44).

(6) (oleh **Gopal Sri Ram HMR**) Meskipun hakim bersifat kritikal terhadap GIE dan Seow, dia dilihat sebagai telah terlepas perhatian penglibatan UEM sendiri dalam transaksi-transaksi dalaman syarikat. Pendekatan keduaan ini untuk penilaian keterangan membentuk salah arah yang serius yang mengakibatkan kesilapan keadilan, yang mana mewajarkan campur tangan mahkamah rayuan (lihat perenggan 47).

(7) (oleh **Gopal Sri Ram HMR**) Pandangan objektif akaun-akaun tersebut menunjukkan bahawa UEG berada dalam keadaan susah kewangan terutamanya kerana wang yang perlu dibayar kepadanya oleh subsidiari-subsidiari UEM dan kumpulan syarikatnya. Walau bagaimanapun UEM telah menyalahkan GIE sepenuhnya dan hakim telah menerimanya sebegitu tanpa meneliti keterangan sewajarnya. Oleh itu penemuan bahawa Seow telah mengendalikan pengurusan urusan-urusan kewangan UEG tanpa sebarang keraguan tidak dapat dipertahankan berdasarkan keterangan dokumentar berasingan semasa dan adalah bertentangan dengan kebarangkalian kes (lihat perenggan 49).

(8) (oleh **Gopal Sri Ram HMR**) Dengan mengambilkira keseluruhan keterangan, termasuklah dokumen-dokumen semasa yang tidak dipertikaikan, tiada antara alasan-alasan aduan yang ditimbulkan oleh UEM dan yang dikendalikan oleh Mahkamah Tinggi boleh disahkan. UEM oleh itu telah gagal untuk membuktikan wujud kes penindasan di bawah s 181 Akta dan petisyennya oleh yang demikian ditolak (lihat perenggan 51).

(9) (oleh **Gopal Sri Ram HMR**) Perkara-perkara yang ditimbulkan oleh GIE tidak membentuk alasan-alasan untuk membuat petisyen di bawah s 181 Akta dan oleh itu, untuk alasan-alasan yang berbeza daripada apa yang telah diberikan oleh Mahkamah Tinggi, petisyen GIE juga adalah ditolak (lihat perenggan 52).

(10) (oleh **Zainun Ali HMR**) Jika terdapat pelanggaran peruntukan-peruntukan keutamaan membeli maka jelas seorang pemegang saham berhak kepada faedah-faedah keutamaan membeli tersebut mempunyai kausa tindakan untuk melindungi kepentingannya. Dalam rayuan ini, UEM bukan hanya bertindak melanggar peruntukan-peruntukan keutamaan membeli tetapi ia juga telah meminta GIE mengenepikan hak-hak tersebut di bawah perjanjian pemegang-pemegang saham. Tambahan pula UEM telah menawarkan GIE saham-saham atas terma-terma yang kurang baik daripada yang telah diberikannya kepada Nova Nusantara. UEM oleh itu tidak bertindak seadilnya kepada GIE seperti yang dilakukannya terhadap pihak ketiga, Nova Nusantara (lihat perenggan 65–68).]

Notes

For cases on oppression, see 3(1) *Mallal's Digest* (4th Ed, 2006) paras 501–548.

For cases on petition, see 3(1) *Mallal's Digest* (4th Ed, 2006) paras 1321–1456.

Cases referred to

Ang Hiok Seng v Yim Yut Kiu [1997] 2 MLJ 45 (refd)
Armagas Ltd v Mundogas SA (The 'Ocean Frost') [1985] 1 Lloyd's Rep 1 (refd)
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Eastern & Oriental Hotel [1951] Sdn Bhd v Fernandez [1989] 1 MLJ 35 (refd)
Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33 (refd)
HR Harmer Ltd, Re [1959] 1 WLR 62 (refd)
Hunter v Hunter [1936] AC 222 (refd)
Krishna Kamini v Nilmadhab 1923 AIR Cal 63 (refd)
Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors [1994] 2 MLJ 789 (refd)
Lee Ing Chin v Gan Yook Chin [2003] 2 MLJ 97 (refd)
Lee Panavision Ltd v Lee Lighting Ltd [1992] BCLC 22 (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)

Owen Sim v Piasau Jaya Sdn Bhd [1996] 1 MLJ 113 (refd)
Safeguard Industrial Investments Ltd v National Westminster Bank Ltd [1980] 3 All ER 849 (refd)
Scotts Trustees, Re [1959] AC 763 (refd)
Tett v Phoenix [1984] BCLC 599 (refd)
Theakston v London Trust plc [1984] BCLC 390 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)
Tivoli Freeholds Ltd, Re [1972] VR 445 (refd)
Vasu Devan v VA Nair [1985] 1 MLJ 137 (refd)
Wisniewski v Central Manchester Health Authority [1998] PIQR 324 (refd)
Woolworths Ltd v Kelly (1991) 4 ACSR 431 (refd)

Legislation referred to

Companies Act 1951 [Aust] s 123
Companies Act 1965 ss 131, 181
Companies Act 1948 [UK] s 210

Appeal from: Suit No D5(D9)–26–43 of 2000 (High Court, Kuala Lumpur)

Gideon Tan (YC Chin with him) (Gideon Tan Razali Zaini) for the appellant.

PY Chong (Liquidator, Nordin Torji & Partners) for the first respondent.

Dominic Puthucheary (Firoz Hussein and Cheng Mai with him) (Puthucheary Firoz & Mai) for the second respondent.

Malik Imtiaz Sarwar (Malik Imtiaz Sarwar) for the third and fourth respondents.

Gopal Sri Ram JCA:

FACTS AND BACKGROUND

[1] This case is about a joint venture gone wrong. There is now litigation about it. It has now come to us in the form of an appeal directed against orders made by the Kuala Lumpur High Court on two petitions. For ease of reference I will refer to them as the UEM petition and the GIE petition. I will explain later in this judgment what each is about. But first the facts.

[2] On 2 November 1993 United Engineers (M) Bhd ('UEM') and Genisys Integrated Engineers Pte Ltd (GIE) entered into an agreement. It is titled 'shareholders agreement'. But in essence it is an agreement for both these companies to jointly venture into and exploit the mechanical and

A electrical engineering market in Malaysia. In short, it is a joint adventure. A private limited company called United Genisys Sdn Bhd ('UEG') was incorporated as the vehicle to carry out this joint adventure. Pursuant to the terms of the shareholders agreement UEM held 51 % of UEG's shares and GIE held the remaining 49%. UEG was not to venture into those areas in B which either party was already involved in. The shareholders agreement refers to this as 'exempted business'. Clause 6 of the agreement describes the respective roles of UEM and GIE in the joint venture as follows:

C 6.1 UEM shall provide its knowledge and expertise in advising and assisting the Company on local practice and usages, strategy and prospective business.

6.5 GIE shall provide and assist the Company with its management and procurement systems and provide technical expertise in Mechanical D and Electrical Engineering and training of staff on application of procedures. GIE shall furnish to the Company within one (1) month of its incorporation, the detail schedule of staff training on application procedures.

E

[3] Under the terms of the agreement, although the management and control of UEG was vested in its board of directors, the day to day management of its business and affairs were delegated to Seow Boon Cheng (Seow), GIE's nominee on UEG's board. In fact Seow always represented GIE F on the board of UEG. But that was not the case with the UEM nominated directors: they kept changing from time to time.

[4] UEG began well. It obtained mechanical and engineering contracts for several projects worth many millions of ringgit both in Malaysia and abroad. G For some five years or so the relationship between the UEM nominated directors and Seow was excellent. There was little or no formality in their dealings so far as the business and affairs of UEG were concerned. There were no complaints made either by UEM or its nominated directors on UEG's board about the way in which Seow managed UEG's business. In fact, an H audit of UEG carried out in March 1998 gave Seow the credit for UEG's success in the following terms:

> … UEM Audit would like to commend the CEO for his invaluable contributions to the success of UEG.

I

[5] Despite this glowing tribute, the relationship soured in about mid-1998. According to GIE it all started with UEM's decision to dispose of

its shares in UEG to a third party called Nova Nusantara Sdn Bhd. Why did UEM decide to rid itself of UEG? The answer is provided by Sulaihah Maimunni who was UEM's nominee on UEG's board at the time when the problems in the relationship began. She is the fourth respondent in the GIE petition. She gave evidence before the High Court. She said that the global financial crisis of 1997 had affected UEM. The board of UEM decided to dispose of all what it considered as its non-core businesses. UEG was considered to be a non-core business because of the financial crisis of 1997. A buyer was therefore identified to whom UEM would dispose of its shares in UEG.

[6] It is beyond dispute that UEM's decision to sell off its UEG shares to Nova Nusantara was in breach of the shareholders agreement. This is because that agreement contains a pre-emption clause. It is cl 12.3. It sets out the elaborate procedure which must be strictly followed when either UEM or GIE wish to sell their stake in UEG. It is a very long clause. No purpose will be served by setting it out here. In essence what UEM should have done, but did not do, is to offer its shares in UEG to UIG in the first place. If you follow the strict letter of the agreement it should not have dealt with Nova Nusantara to the extent to which it did. It should have gone to GIE first. UEM must have realised that its dealing with Nova Nusantara was a breach of the shareholders agreement. Because, on 21 July 1998 it wrote to GIE asking the latter to waive its preemption right under the shareholders agreement. GIE responded on 6 August 1998. It asked for the terms on which the proposed sale was to proceed. UEM did not respond. But Nova Nusantara's solicitors did. On 17 August 1998 they wrote to UEG giving the terms of the sale and purchase between UEM and Nova Nusantara and attaching a copy of the memorandum of understanding between UEM and Nova Nusantara. Shorn of all its frills, what it amounted to was this. Nova Nusantara would pay RM1.02m to UEM for its 51% shareholding in UEG. The added incentive was that — to quote from Nova Nusantara's lawyers' letter — 'Listing of UEG is to be attempted within three (3) years of the takeover …' What was to happen if listing never took place does not appear to be clear either from that letter or from the memorandum of understanding that accompanied it. On 7 September 1998 GIE wrote to UEM. In essence this is what its letter did. First, it set out the essential features of cl 12.3 of the shareholders agreement conferring rights on UEM and GIE in the event either wished to withdraw from the joint venture. Second, it expressed its willingness to purchase from UEM its UEG shares on the same terms as those proposed by Nova Nusantara with one difference. The duty on GIE to take steps to have UEG listed would expire at the end of three years after the sale or if the attempt at listing failed. UEM's response came in the form of its

letter of 22 October 1998. In it UEM offered to sell its UEG shares to GIE for a sum of RM10.71m. The purchase price was to be paid in full upon signing the sale and purchase agreement. As may be seen, UEM's offer to GIE was far less favourable than that contained in the memorandum of understanding it had with Nova Nusantara. It is a matter that ought to have aroused the High Court's suspicion, particularly when viewed in the light of Sulaihah Maimunni's evidence about UEM's motive. Unfortunately, nowhere in the learned judge's judgment is there a reference to Sulaihah Maimunni's evidence on this part of the case.

[7] Negotiations followed UEM's offer to GIE. They were long and protracted, covering a period of almost two years. During this period the relationship between the joint adventurers deteriorated with a threat from UEM to wind up UEG. This is contained in two documents. The first is a note in the handwriting of the then managing director of UEM appearing on GIE's letter of 19 January 2000 and dated on same day. It says: 'Better to close down the company'. The 'company' which the note refers to is UEG and the expression 'close down' can only refer to an intention to wind it up. The second document is a fax dated 9 May 2000 from UEM to UEG marked for Seow's attention. It is signed by Sulaihah Maimunni. The material part of that fax reads:

1 S&P	UEM will settle RM2,746,072.84, being the amount owing to UEG as at 30 April 2000 in respect of the subcontract works a Telekom Tower; — UEM will settle RM153,716, being the amount owing by UE Construction Sdn Bhd to UEG as at 30 April 2000 in accordance with the schedule attached; — UEM will settle RM1,741,175, being 50% of the amount owing by Pati Sdn. Bhd to UEG in respect of the Wakaf College works; — UEG to settle RM920,000, being the settlement amount owing to EPE Power Corporation Berhad; and — All other changes of terms and onditions proposed by our legal advisers, Messrs Abu Talib Abdul Rahman to your 1egal advisers, Messrs Zaid Ibrahim & Co via their facsimile transmission dated 29 April 2000.
2. Subcontract	— Besides Performance Bond, UEG to provide UEM an approved bank guarantee for a sum equivalent to 5% of the Contract Sum and maintain the guarantee at its own cost, until the finalisation of accounts of the contract between the Main Contractor and UEM, and full resolution of all matters arising from and in respect of the Subcontract; and — all other previous changes of terms and conditions proposed by our legal advisers, Messrs Abu Talib Abdul Rahman to your legal advisers, Messrs Zaid Ibrahim & Co.

In view of the subject matter has been long pending, we would appreciate your response on or before 18 May 2000 by accepting the above-mentioned terms, so that the S & P and the Subcontract can be formalised by end of May 2000, failing which, we may commence the winding up proceeding.

[8] There you have it. If GIE did not accept the terms within the deadline set by UEM, then steps would be taken by the latter to have UEG wound up. This is a very important event in the consecutive story in this case because it is a factor that the High Court ought to take into account when evaluating the conduct of UEM in relation to its role as a joint adventurer in a relationship that is essentially fiduciary in nature calling for *uberrimae fides* or utmost good faith on its part. It is the same as the relationship between partners. See, *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474. As for good faith in a partnership context I would merely refer to the judgment of Mohamed Azmi FJ in *Vasu Devan v VA Nair* [1985] 1 MLJ 137 where he said that: 'Good faith is especially required to be observed when one partner is endeavouring to get rid of another or to buy him out.' I would add that good faith is equally required when a joint adventurer wishes to exit from a joint venture. Unfortunately, the judgment of the High Court makes no reference at all to this aspect of the case.

[9] After the fax of 9 May 2000 the relationship between UEM and GIE deteriorated further. It is quite apparent from a review of the contemporaneous documents that UEM lost interest in the joint venture after having taken the decision to rid itself of its shares in UEG. It took the position that it had the prerogative to determine whether UEG would survive or be wound up. This is reflected in the testimony of Sulaihah Maimunni that it was UEM's prerogative to do — and here I quote from her evidence — 'whatever it wants to do with the company', that is to say, with UEG. This is an important part of the evidence; for it reveals a 'we will do as we want' attitude on the part of UEM which is not consonant with its obligation of good faith as a joint adventurer. The High Court should have been alerted by this evidence in its approach to the truth of UEM's case against GIE. Unfortunately, the High Court appears to have overlooked this aspect of the case.

[10] Matters came to a head following the total breakdown of the relations between UEM and GIE. Litigation was commenced. Each joint-venturer presented a petition for relief under s 181 of the Companies Act 1965 ('the Act'), each contending that the other had acted oppressively. The petitions were tried together before the High Court at Kuala Lumpur which dismissed

GIE's petition but granted UEM's. The High Court ordered UEG to be wound up. GIE appealed against both decisions. At the close of arguments we reserved judgment.

THE UEM PETITION

(i) *The respective cases*

[11] In a gist, UEM's case is that Seow, conducted the affairs of UEG with a singular lack of probity and thereby oppressed it as a shareholder. Seow performed acts without proper board authorisation. UEM had been kept in dark about certain transactions and payments. An audit by UEM revealed Seow's misconduct. Hence it presented its petition on 13 April 2001. Pausing for a moment, you will see at once that this does not tally with the contemporaneous documentary evidence already discussed which reveals that the true intention of UEM in commencing proceedings was for the purpose of winding up UEG.

[12] GIE's case is that the problems arose because of a conscious decision by UEM to starve UEG and to eventually have it wound up. This decision was taken following the global financial crisis of 1997. Seow did the acts complained of to keep UEG alive. As for the transactions complained of, these were acquiesced in by UEM. UEM breached the shareholders agreement. Hence GIE presented its petition for relief.

[13] On a joinder of the issues arising from the pleaded cases of the respective parties the learned judge had to decide as a question of fact: (i) whether UEM's petition was properly supported by material showing that GIE, and in particular Seow, had managed UEG's affairs in a manner oppressive to UEM; or (ii) whether UEM's petition was based on a conscious decision to starve UEG and to have it wound up as alleged by GIE. Unfortunately, nowhere in his judgment did the learned judge mention or deal with GIE's case as presented to him and supported as it was by the chain of events forming the consecutive story forming the heart of the dispute. It would therefore appear that the learned judge erred in his handling of the facts that lay at the axis of the dispute between the parties. GIE had placed before him a most serious allegation against UEM. As a matter of pure natural justice GIE was surely entitled to have its case considered on the merits. The learned judge's failure to adequately address GIE's case is a matter of serious concern. It certainly lends support to GIE's complaint that there was no judicial appreciation of the evidence. I accept, of course, that whether there is oppression in a given case is a question of fact. As Menhennitt J said in *Re Tivoli Freeholds Ltd* [1972] VR 445:

> Whether or not a company is being conducted in a manner oppressive to certain shareholders depends upon all the circumstances and it is not possible to attempt a universal definition.

But we must also heed our duty as a Court of Appeal to intervene in appropriate cases where there has been no adequate appreciation or evaluation of the parties' respective cases and a judicial appreciation of the evidence.

(ii) *The approach to s 181*

[14] In arriving at his conclusions of fact a judge hearing a petition under s 181 of the Act must not consider events in isolation but as part of a consecutive story. In *Re HR Harmer Ltd* [1959] 1 WLR 62 Jenkins LJ approved the following approach adopted by Roxburgh J, the trial judge in that case, when interpreting s 210 of the UK Companies Act 1948:

> The word 'oppression' is a word in common use and understanding in the English language. But I would just observe in passing that it [s 210] does not say 'who complains of acts of oppression'; it says 'that the affairs of the company are being conducted in a manner oppressive…' In other words, I think *it invites attention, not to events considered in isolation, but to events considered as part of a consecutive story*; and it is because I take that view that I have not dealt (and do not propose to deal) with each of the items which I have enumerated one by one.
>
> (Emphasis added.)

[15] Annuar J (later CJ (Malaya)) in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors* [1994] 2 MLJ 789 adopted the same approach and an appeal against his decision to the Supreme Court was dismissed. So too, the Federal Court in *Owen Sim v Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113 approved of this approach.

[16] A careful reading of the judgment under appeal shows that the learned judge did not adopt the approach alluded to. Instead he dealt with the case on the basis of isolated incidents relied on by UEM as constituting oppression. The only reference to the relationship between the parties appears in paras 6 and 7 in his judgment:

> 6. The subject matter of the disputes between GIE and UEM in this case is UEM Genisys Sdn Bhd (UEG). UEG was formed as a joint venture company pursuant to as shareholders' agreement dated 3 November 1993 whereby UEM holds 51% of the shares and GIE

holds 49%. From the time of inception until UEM's decision to exit the joint venture on 21 July 1998, the parties conducted themselves and the affairs of UEG in accordance with the shareholders' agreement. UEG was formed for the purpose of establishing a joint venture to undertake mechanical and electrical contract works. UEG commenced operation and was awarded a considerable amount of contract works by UEM and its related companies. The work in progress, as captured in the audited accounts of UEG for the financial year ending 31 December 1998, amounted to RM541,565,914. Despite the generous award of contracts to UEG, it has never paid any dividends to its shareholders. The actual management and control of UEG has been, since its inceptions, in the hands of its directors nominated by GIE. Seow Boon Cheng (Seow) has been managing and continues to manage UEG. (Seow was appointed the CEO of UEG. He is also the managing director and majority shareholder of GIE). UEM and its management placed great trust in Seow to manage UEG with minimum level of interference either from UEM or its nominee directors.

7. As agreed by the parties, the number of directors in UEG shall be four, made up of two nominees from UEM and two nominees from GIE. The parties also agreed that each party shall have the exclusive right to determine the period their nominee directors will hold office and at any time to remove any or all of them and to nominate another in his place. It was also agreed that one of the directors nominated by UEM shall be the chairman of the board of directors, who shall have no costing vote. The shareholders' agreement also provides that all decision of the board of directors shall be decided by a majority of votes.

[17] Thereafter, the judgment moves on to a discussion of the law relating to s 181. This is followed by an examination of the individual complaints of each petitioner with the learned judge's conclusions at the end of each case. But nowhere in that discussion is there any reference to the approach to be taken when evaluating a complaint of oppression made pursuant to s 181. Indeed there is no reference to *In re Harmer*, *Kumagai Gumi* or *Owen Sim* anywhere in the judgment under appeal. I think that it is this omission that led to the learned judge in failing to properly evaluate the facts presented to him as part of a consecutive story when deciding whether there was oppression in the particular circumstances of this case. This error in the approach to the evaluation of a fact pattern in a case where oppression is

complained of in proceedings brought under s 181 of the Act has, in my respectful view, rendered the judgment of the High Court vulnerable to appellate correction.

(iii) *Appellate approach*

[18] I am very much conscious that this is a case which turns on its own facts. The appellate approach that is to be adopted in a case such as this is well settled. We, as an appellate court, will not interfere with the decision of a trial judge unless satisfied that his or her findings are plainly wrong. The grounds on which this court may review fact sensitive findings are set out in *Lee Ing Chin v Gan Yook Chin* [2003] 2 MLJ 97, in a passage that was approved by the Federal Court:

> [28] Very recently, this court in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 reviewed some of the leading authorities on appellate intervention and identified the general rule of appellate noninterference. We also considered some of the categories in which appellate interference is warranted. We find it unnecessary to repeat what we said there. Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.
>
> [29] A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.

[19] One of the cases referred to by this court in that case was *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, where the trial judge had found the plaintiff in that case guilty of fraudulent misrepresentation based on the veracity of the defendant's witnesses. On appeal, the Federal Court reversed his finding of fraud. Chang Min Tat FJ said at p 234:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.* Plausibility should never be mistaken for veracity.
>
> (Emphasis added.)

[20] In *Eastern & Oriental Hotel [1951] Sdn Bhd v Fernandez* [1989] 1 MLJ 35, the Supreme Court, speaking through Wan Hamzah SCJ approved of and applied the following observation made in *Armagas Ltd v Mundogas SA (The 'Ocean Frost')* [1985] 1 Lloyd's Rep 1 which reads:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

[21] GIE's appeal in respect of UEM's petition is grounded principally on the submission that the learned judge failed to judicially appreciate the evidence in respect of each item of the alleged oppressive conduct. Consequently, the learned judge was plainly wrong in arriving at his decision. This submission requires us to review the material in respect of each ground of complaint dealt with by the learned judge but not in isolation but as part of the factual background forming the consecutive story in this case. When discussing UEM's case, it is important to bear three matters in the forefront of one's mind. First, that the events complained of took place at a time when the relationship between the parties was excellent. The evidence on record shows that decisions in respect of some of the matters complained of were

taken informally. There is nothing wrong with a company's affairs being managed in this fashion. As Buckley J observed in *Re Duomatic* [1969] 2 Ch 365:

> … where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.

[22] Here we have only two shareholders of UEG. Each had its representative on UEG's board of directors. If they agree to take a given course of action without convening a formal meeting, the action taken is binding on both of them and neither can complain about it later. The second matter which is of importance on the facts of the present instance is this. The principal witness for UEG was someone who was not at the scene when most of the matters complained of occurred. This is an important fact that must be taken into account by a judicial arbiter in assessing the weight of the particular witness's evidence. There is no mention about this aspect of the case in the learned judge's judgment. Third, UEM's representatives on UEG's board at the time when some of the matters complained of occurred were not called by UEM in support of its case. Whether this failure on UEM's part warranted the exercise of discretion on his part to draw an adverse inference is a point that was never addressed by the learned judge. With that I now turn to address the individual complaints of oppression alleged by UEM.

The items of oppressive conduct

(i) The Hanoi Sheraton project

[23] The facts relevant to this ground of complaint are these. A company called Gammon Construction Co Ltd was the contractor engaged to construct the Sheraton Hotel in the city of Hanoi, Vietnam. Gammon then subcontracted the mechanical and electrical works for that project to UEG which in turn contracted the whole of those works to GIE. In respect of this complaint the learned judge made the following finding:

(1) The Hanoi Sheraton project — the misappropriation of US$13,859,484.10 (RM52,666,040). On 24 May 1997, UEG entered into a subcontract with Gammon-Road Builder Joint-venture to undertake the mechanical and electrical installation services for the

Hanoi Sheraton Project, at a sum of US$16,800,000 (RM63,840,000). On 20 August 1997 the subcontract was novated and UEG entered into a novation agreement with Gammon — CCI Construction Ltd. Despite the fact that the subcontract was awarded to UEG, payments made under the subcontract as well as the novation agreement were not received by UEG, but were diverted directly to GIE in Singapore on instructions given by Seow, as per letter dated 22 November 2000 on UEG's letterhead signed by Seow. Under cross-examination Seow admitted this fact (refer to p. 107 of the notes of proceedings). Under cross-examination Seow also admitted:

(a) there was no written resolution passed by the board of directors of UEG in respect of the said payments made directly to GIE;

(b) there was no disclosure minuted in the UEG's board of directors meeting to the fact that the payments were to be made directly to GIE in Singapore;

(c) GIE made a profit of S$8,786,605 from the Hanoi Sheraton Project, which was never disclosed to the board of directors of UEG;

(d) he (Seow) did not inform the auditors of UEG, Messrs Ernst & Young, that the payment due to UEG for the Hanoi Sheraton Project had been paid directly to GIE in Singapore despite the fact that the auditors had specifically sought clarification, on the Hanoi Sheraton Project.

[46] It is clear from the above that the board of directors of UEG were at all material times unaware that the US$13,859,484.10, which was due to UEG in respect of the Hanoi Sheraton Project, had been surreptitiously diverted by Seow to his own company in Singapore GIE. (Seow, as the CEO and director of UEG is also the managing director and virtually the owner of GIE). UEG, to date, has received nothing whatsoever from this project.

[24] Now the documentary evidence in respect of the Hanoi Sheraton project includes a letter dated 20 January 1997 from UEG to GDP Architects Sdn Bhd. It is signed by Azmi Abdul Jalil, the chief operating officer of UEG nominated by UEM to hold that post. The letter was copied to a number of persons including Dato' Jaafar Dato' Abdul Hamid, the managing director of the UEM Group of companies. The essential paragraphs in that letter read as follows:

> Based on the original mutual agreement and understanding between the previous main contractor, Road-Buider Gammon JV, and the owners, VIMAS JV Co. Ltd. UEG has fully and wholly subcontracted the M & E works under UEG's responsibility to GIE Pte. Ltd. Singapore.
>
> GIE Pte. Ltd. has in turned set up a representative office in Hanoi to undertake the project. The representative office, as far as we (UEG) were told, have already applied for the construction license in Hanoi.
>
> With the above arrangement we seek your kind consideration to waive the need for UEG to register a local office in Hanoi and apply the necessary Construction license. We believe this will only duplicate what is currently being done through GIE's representative office in Hanoi.

If any part of that letter was untrue, one would not expect UEM's representative in UEG to sign it. Similarly, if the letter was a tissue of lies or a gross misrepresentation of the truth, you would expect a serious protest from the managing director of the UEM group of companies or by someone on his behalf. But that was not the case. As may be seen from the above quoted passage from the learned judge's judgment, neither this document nor its corrosive effect upon the truth of UEM's case was ever considered by him.

[25] The other document is the minutes of the meeting of UEG's board held on 6 March 1998. Those present included the UEM nominated directors. The following minute is recorded under 'other matters':

> SHERATON HANOI HOTEL, VIETNAM
>
> Mr Seow Boon Cheng informed the Board that GIE, the subcontractor for the mechanical and engineering, works ('M & E Works') for the Sheraton Hanoi Hotel in Vietnam had not been 25 paid for the progress payment certified by the Main Contractor. The outstanding payment due therefrom amounts to USD600,000 (for works done from October to January 1998).
>
> In the meantime, the Main Contractor had deducted a sum of USD43,000 for contra charges, for which the Company had objected. Accordingly, the Company issued a notice to the Main Contractor on 18 February 1998 to suspend the M & E Works on the ground of non payment of the progress payment certified, viz for the deduction for contra charges.

After setting out some other matter the minute concludes thus:

> After due deliberation the Board directed management to write direct to Sheraton Hotels to inquire the status of the outstanding payment due to GIE and to proceed with the M & E works only upon receipt of a favourable reply in respect thereof.

[26] There you have it. UEG's board knew all about the subcontract and about the payments that were to be made to GIE in respect of the Hanoi project. This exposes UEM's allegations made in support of this ground of complaint to be completely lacking in substance.

[27] Last, but not least, you have the subcontract itself. Clauses 10(A) and (B) of that document are self explanatory. This is what they say:

> (A) In consideration of the services to be rendered by GIE under this Agreement, GIE shall be paid a sub-contract sum (the 'Sub-Contract Sum') equivalent to the contract sum (before deduction of 2% of profit tax which will be levied by authority in Vietnam and to be paid by GIE) payable by the Main Contractor to UEG under the M & E Contract (the 'M & E Contract Sum') less UEG's procurement fee of three per cent (3%) of the M & E Contract Sum (the 'Procurement Fees') in accordance with sub Clause (B) below. There shall be no variation of the Sub Contract Sum save as a result of any variation in the M & E Contract Sum or the Works to be performed by GIE in accordance with Clause 13.
>
> (B) Without prejudice to UEG's primary obligation to make payment of the Sub-Contract Sum to GIE, UEG shall procure and ensure that the Main Contractor pays the M & E Contract Sum direct to GIE in accordance with the payment terms under the M & E Contract. GIE shall within a period of fourteen (14) days after receipt of the M & E Contract Sum from the Main Contractor pay to UEG the Procurement Fee by way of a telex transfer made out in favour of UEG.

Now, the learned judge did not make a finding that this document was false or unreliable. In fact he makes no reference at all to it in his judgment.

[28] It follows that the following finding of the learned judge:

> It is clear from the above that the board of directors of UEG were at all material times unaware that the US$13,859,484.10, which was due to UEG in respect of the Hanoi Sheraton Project, had been surreptitiously diverted by Seow to his own company in Singapore GIE.

flies in the teeth of contemporaneous evidence going the other way. There is therefore merit in GIE's complaint that there was no judicial appreciation of the evidence on this point. Based on the authorities already cited, the learned judge's conclusion on this part of the case cannot stand. With that I turn to the second ground of complaint.

(ii) The RM1m transfer

[29] The finding of the learned judge on this ground of complaint is as follows:

There are evidence to show that Seow had transferred RM1m in an unauthorised and unlawful manner from UEG's account at Mayban Finance Bhd to GlE's bank account at Maybank Bhd, Jalan Klang Lama branch. The said transfer was made by one Azni Amran (of UEG) on instruction of Seow. Seow in his evidence in court admitted the following:

(a) that the RM1m was transferred from UEG's account to GlE's account; (see: pp 23–24 of the notes of proceedings);

(b) it did not cross his mind whether the transfer was right or wrong; (see: p 60 of the notes of proceedings);

(c) he never inform the other directors of UEG about the transfer of the money; (see p 61 of the notes of proceedings);

(d) there was no authorisation given by UEG to transfer the money to GIE; (see: p 67 of the notes of proceedings);

(e) that the RM1m has not been retransferred back to UEG; (see: p 67 of the notes of proceedings); that the RM1m has not been retransferred back to UEG; (see: p 67 of the notes of proceedings);

(f) that the RM1m which was transferred to GlE's account has all been spent; (see: p 76 of the notes of proceedings);

(g) that he (Seow) could operate GlE's bank account on his own ie, signing singly (see: p 80 of the notes of proceedings).

> [47] From the evidence, there is a clear indication that the RM1m was misappropriated by Seow and GIE. Even if one was to accept Seow's assertion that the RM1m was not transferred to GIE upon his instructions, the fact remains that he did not return the money to UEG, but spent it without the knowledge or consent of the board of directors of UEG. Bearing in mind that Seow was the only single signatory to the related GlE's account where the RM1m was transferred into.
>
> [48] Even if GIE had decided that it was holding the RM1m on trust of UEG (as alleged by Seow in his evidence in court) then it would have been a clear case of criminal breach of trust by Seow when GIE went ahead and spent all the money without the knowledge and consent of the board of directors of UEG. The RM1m does not belong to GIE or Seow and therefore GIE or Seow has no right in law to spend or utilise the money.

[30] The undisputed facts relevant to this ground of complaint are as follows. All cheques drawn on UEG's account had to carry two signatures — one by the GIE representative and the other by UEM's nominated signatory. The transfer of the RM1m was effected by Azni Amran to GIE's account at its bank at Jalan Kelang Lama, Kuala Lumpur. At the material time, Azni Amran was nominated by UEM to sign all cheques drawn on UEG's account.

Seow did not sign the cheque in question. The bank on whom the cheque was drawn honoured payment despite the fact that there was noncompliance with the drawing mandate. When GIE's accountant in Singapore realised that the payment had been received by GIE she faxed UEG in the following terms:

> Further to our teleconversation, this is to confirm that Genisys will be holding on behalf of UEG, in trust, the amount of RM1,000,000 remitted to our Maybank KL account on 26/8/00.

There is therefore absolutely no basis on which the learned judge could have come to the conclusions he did on this ground of complaint. Further, Seow was, on the basis of a police report lodged by Sulaihah Maimunni, charged with the offence of criminal breach of trust for the transaction in question. However, the sessions court acquitted him without calling for his defence. This fact was placed before the learned judge who obviously disregarded it when coming to his conclusion. At this stage I would make two observations. In the first place, finding a man guilty of a criminal offence involving fraud in civil proceedings is so serious a matter that the law requires such an allegation to be proved beyond a reasonable doubt. See, *Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45. In the second place, the presumption of innocence with which an accused is clothed 'is reinforced by his acquittal by the trial court …' See, *Balbir Singh v State of Punjab* 1957 AIR SC 216, at p 222, per SK Das J. See also, *Chandrappa v State of Karnataka* 2007 Cri LJ 2136. It is apparent from the passage in the judgment under appeal quoted above that the learned judge did not have these important principles in mind. His analysis of the evidence was confined to only certain portions of Seow's evidence without considering the other evidence that overwhelmingly pointed to Seow's innocence. Based on what I have said thus far, it is clear that the learned judge did not properly evaluate or appreciate the totality of the evidence on this part of the case. His finding on this ground of complaint is therefore fatally flawed.

(iii) The payment to Elton Sun

[31] The finding by the learned judge on this ground of complaint is as follows:

> The issuance of cheque dated 5 April 2000 in favour of Elton Sun Kim Choy (an ex-employee of UEG) for an amount of RM50,000 on instruction of Seow, is another instance of how funds of UEG were misappropriated or misused by those having control of UEG. The evidence shows that the cheque though issued, was never given to Elton Sun Kim Choy. The cheque was cashed but the RM50,000 was never paid to Elton Sun. The records of UEG show that the payment was being made by UEG for Job No: 6030 being the kitchen subcontract for the Subang Sheraton Project. Seow agreed that he received an enquiry from Cik

Sulaihah Maimunni (a director nominated by UEM in UEG) in relation to the payment but he did not reply to the enquiry. Seow admitted in his evidence that he did not get, the approval of the board of directors to issue the cheque for RM50,000 in favour of Elton Sun and never informed then of the matters relating to the cheque. Seow also admitted that, of the RM50,000 he had intended to use RM30,000 to pay Elton Sun for his services to GIE on the Yangon Sedona Project. The project was a GIE project, and not UEG project. However, nothing in the payment voucher stated that RM30,000 (out of the RM50,000) was being paid on behalf of GIE. Seow claimed that the RM50,000 was kept in the safe in cash for two years. It was not redeposited into UEG's bank account. It was also not reflected in the draft management accounts and that UEG's accountant was unaware that the RM50,000 was kept in the safe.

In the course of his evidence, Seow admitted that although he signed a cheque for RM50,000 in favour of Elton Sun and the payment voucher for Job No: 6030 (for kitchen subcontract) on 5 April 2000, he had already signed the statement of final account for the kitchen subcontract on 4 April 2000 (the day before). Seow also agreed that there was no longer any need to prepare loss and expenses claim for the kitchen subcontract works as UEG had already accepted the statement of final account. Yet, Seow proceeded to sign and issue the RM50,000 cheque the next day (5 April 2000) in respect of the same job, when he knew that there was absolutely no need to do so because on the previous day, 4 April 2000, he had already signed the statement of final account relating to the same Job No: 6030.

[32] With respect, this finding of the judge cannot stand in view of the independent, contemporaneous documentary evidence that shows that the money never left UEG. What happened was this. A cheque for RM50,000 was made out to Elton Sun but cashed by UEG. The money was never paid out to Elton Sum. Instead, the cash was placed in UEG's safe. The police officer who investigated the report lodged by Sulaihah Maimunni confirmed that the money was indeed in UEG's safe. This evidence was never challenged by UEM. In the face of the irrefragable evidence to the contrary it was a serious misdirection on the facts by the learned judge to hold as he did on this issue.

(iv) The no profit rule and Christina Rani

[33] Christina Rani is a lawyer by profession. She was once UEG's employee. She was its contracts manager. She resigned and set up practice as an advocate and solicitor. In late September 1999, she was instructed by Seow to act as UEG's solicitor. In January 2001 she was appointed as a director of UEG pursuant to an order of court in proceedings brought by GIE. The learned judge's views on this part of UEM's case are as follows:

[49] Christina Rani was another director in UEG nominated by GIE. She was also an advocate and solicitor working for Messrs Sahadin and Associates. Seow instructed Christina Rani to do some legal works for UEG before and after she was appointed a director of UEG.

A The evidence shows that although payments were made to her by UEG, such payments were never authorised or approved by the board of directors of UEG, and ratified by the shareholders in a general meeting.

[50] It is trite law that a director of a company is a fiduciary and in order for a director to receive payment, such payment must be disclosed to and authorised by
B the board of directors. Where secret profits are made and where fiduciary obligations are breached, then this may result in the assets of the company being at risk. Members or shareholders of a company have a right to ensure that the directors of the company act in accordance with their fiduciary obligations and not to make secret profits from the company. In the present case, there was breach of
C no-profit rule and fiduciary duty by Christina Rani when she received the payments without any authorisation or approval of the board of directors of UEG either generally or specifically. Such act may amount to an oppressive conduct done in total disregard of the interest of the company (EUG) as well as the shareholders. It demonstrates that the affairs of UEG are being conducted in a manner contrary to s 181 of the Companies Act 1965.
D

[34] As may be seen, the learned judge concluded as he did based on the factual postulate that there had been no authorisation by UEG's board of the payments made to Christina Rani. But the evidence goes quite the other way.
E For Sulaihah Maimunni in para 8 of her affidavit affirmed on 15 May 2001 makes a statement from which it is an irresistible inference that she as the UEM nominated director on the board of UEG had participated in the decision to instruct Christina Rani to act on UEG's behalf. This is what she says:
F

8. There is no obligation for the petitioner [UEM] to deal with the legal suits against the respondent company [UEG]. I will state that Miss ST Christina Rani who is a director of the respondent company has been throughout her tenure with the respondent company, been
G assuming the responsibilities for handling all legal matters pertaining to the respondent company. Accordingly I have instructed that all copies of legal matters be forwarded to Miss ST Christina for her further action. It appears that Miss ST Christina in breach of her fiduciary duties as a director had failed to take any action whatsoever
H and this clearly exemplifies the oppressive manner in which the directors of the respondent company nominated by GIE had acted.

[35] You will see from the foregoing paragraph that it is *not* Sulaihah
I Maimunni's complaint that payments were made to and received by Christina Rani without the authority of UEG's board. Her complaint is that Christina Rani did not take action though instructed to do so. In the face of Sulaihah Maimunni's concession in her affidavit quoted above it was not open to UEM to complain about the payments made to Christina Rani because a lawyer

must be paid for work done. And there is evidence in the record provided to us that cheques signed by Sulaihah Maimunni were issued to Christina Rani. It follows that the learned judge's finding on this point is contrary to the evidence and is contrary to the reasonable inferences fairly admitted by UEM's own evidence. I am therefore satisfied that the learned judge's finding on this part of the case cannot stand.

(v) The Metronic contracts

[36] Metronic Engineering Sdn Bhd, or Metronic for short, was a company 62% of the shares in which were held by Seow. Metronic was already in existence when UEG was incorporated. After UEG's incorporation, its board awarded several contracts to Metronic to provide building automation systems and security systems. UEM's case is that Seow acted in breach of s 131 of the Act because he did not declare his interest in Metronic to UEG's board. The section provides in its first, sixth and seventh subsections as follows:

> (1) Subject to this section every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company.
>
> (6) The Declaration shall be made at the first meeting of the directors held:
>
> (a) after be becomes a director; or
>
> (b) (if already a director) after he commenced to hold the office or to possess the property;
>
> as the case requires.
>
> (7) The secretary of the company shall record every declaration under this section in the minutes of the meeting at which it was made.

[37] UEM contended that Seow had breached s 131 because the minutes of UEG's board did not reflect a disclosure by him of his interest in Metronic. The learned judge accepted that contention and held as follows:

> A careful perusal of the said minutes reveals that they do not record any declarations ever having been made by Seow to inform the board of directors that he was the beneficial owner of the shares in Metronics, a company which at the material time, was being awarded contracts by UEG. Indeed, Seow admitted under cross-examination that at the time when the contracts were awarded to Metronics, he made no declaration of his interest in Metronics, to the board of directors of

> UEG (see: p 74 of the notes of proceedings). Seow also admitted that he was involved in approving the award of the contracts by UEG to Metronics (see: p 61 of the notes of proceedings). Clearly, there is a breach of s 131 of the Companies Act 1965 committed by Seow. This is an instance in which Seow acted in a criminal manner by breaching s 131 of the Companies Act 1965, hoodwinking the board of directors of UEG as to his interests in Metronics and enriching himself by awarding contracts to a company in which he was the 62% shareholder. There was no expression of remose or guilt in the face of a brazen contravention of the law. Not only has UEM been oppressed by these illegalities but corporate governance will be at low ebb if such wanton disregard for the law is allowed to go unpunished. This obviously amounts to clear disregard of the interest of the company, its board of directors as well as the shareholders.

[38] It is my considered judgment that the learned judge misdirected himself on the facts and the law in making the findings in the above quoted passage. Take the factual misdirection. In evaluating the facts and evidence the learned judge misdirected himself in two important respects. The first has to do with the conduct of UEM's case on the issue at hand. In his evidence Seow testified that he had disclosed his interest in Metronic to Dato' Jaafar Abdul Hamid, Azmi Jalil and Abdul Wahab Abdul Hamid all of whom were the UEM nominated directors of UEG at the time the shareholders agreement was entered into. In the course of Seow's cross-examination it was put to him by counsel for UEM that Dato' Jaafar Abdul Hamid, Azmi Jalil and Abdul Wahab Abdul Hamid were not aware of his — to quote counsel — 'ownership in Metronic'. At that stage opposing counsel rose and inquired whether counsel for UEM will — to quote from the transcript of the evidence — 'be calling these two persons to say they were not aware … that's the way it has been going on for the last 28 days'. Counsel for UEM then gave a response which I consider to be most unusual. He said: 'My Lord, certainly we will make an attempt to call them, *if they are available*.' I say 'most unusual' because it is well settled that counsel is prohibited from putting a case to an opposing witness on which he has no instructions or which he is unable to prove. So, when counsel for UEM put it to Seow that the named persons had no knowledge of the former's 'ownership in Metronic' he must have done so on the basis of statements to that effect recorded from the relevant witnesses or other information in his possession. If he was in a position to call them only 'if they are available' then he was in no position to guarantee their presence. Once counsel for UEM made his response, the learned judge should, in the ordinary way, have intervened at once and asked counsel to clarify what he meant. If counsel had said that he had no instructions directly from the named persons, then the learned judge should have reprimanded counsel for putting a case he did not have or could not prove and made the necessary comment in his written judgment about the way in which UEM had conducted its case. If, on the other hand, counsel did have statements from the persons concerned or other information supporting

the case he had put to Seow but had nevertheless omitted to call them as witnesses he was obliged to lead cogent evidence to show why these important witnesses could not be produced before the court to avoid an adverse inference being drawn against UEM. Thus, In *Krishna Kamini v Nilmadhab* 1923 AIR Cal 63, Buckland J said (at p 66):

> So far the learned subordinate judge relies upon the fact that Arjun is not in the defendants, service, that is no excuse at all. The only evidence as to the omission is that enquiries were made at the Bombay office. If a party wishes not have a presumption raised against him by the fact that an important witness has not been called, he should exhaust to the utmost of his power every means to bring that witness before the court.

[39] An example of a satisfactory explanation is where evidence is led to show that a potential witness is absconding or has left the country and could not be traced despite all reasonable attempts. But there was nothing of the sort here. No explanation was proffered. In these circumstances the learned judge ought to have exercised his discretion and drawn the inference that had these persons given evidence, their testimony would have been unfavourable to UEM on the issue in question. See, *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33.

[40] On the drawing of an adverse inference from the failure to call a material witness it is sufficient to quote from the judgment of Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 where, after discussing several cases on the subject he summed up the law as follows:

> From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly

satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

[41] In my judgment, it is a serious miscarriage of justice to put to a witness or party that he or she did not disclose material facts to named persons and then omit to call these persons with no offer of an explanation for the omission. Such a miscarriage of justice occurred in the present case.

[42] The other misdirection on the evaluation of the facts has to do with the shareholders agreement. As I have already said, Metronic was a company that had been in existence before UEG was incorporated. Clause 1.2 which I adverted to earlier in this judgment defines 'exempted business' as follows:

> The existing trades and business of mechanical and electrical engineering works and the related activities currently undertaken by UEM in Malaysia in Power Generation, Power Transmission and Water Treatment and Sewerage Treatment above 50,000 gallons per day capacity and the building automation system and security systems activities currently undertaken by GIE's shareholders in Malaysia.

The learned judge having reproduced cl 1.2 went on to hold as follows:

> Reading cl 1.2 closely, the court is satisfied that those contracts awarded by UEG to Metronics do not come under the ambit of 'exempted contract' under the provisions. On true construction of cl 1.2 of the shareholders' agreement, the exemption therein relates to Building Automation System and Security System activities currently undertaken by GIE shareholders in Malaysia. Seow conceded that Metronics was not a GlE's shareholder. Therefore, there is no question of applying the exemptions under cl 1.2 of the shareholders' agreement to transactions with Metronics.

[43] With respect, the critical words are 'undertaken by GIE's shareholders in Malaysia'. Seow was a shareholder of GIE. Seow, through his shareholding in Metronic, participated in the 'the building automation system and security systems activities'. The evidence on both sides points to no company other than Metronic that comes with the definition of 'Exempted Business' in the shareholders agreement. The irresistible inference is that Seow must have told UEM about his interest in Metronic. Unfortunately, the learned judge did not adopt this approach to cl 1.2 of the shareholders agreement. He did not ask himself the right question: is it more probable that cl 1.2 was put into the shareholders agreement the way it was because Seow informed the named directors of UEM about his interest in Metronic? Had the learned judge adopted this approach to the facts he would have accepted Seow's evidence on the point. These omissions by the learned judge resulted in his failure to properly appreciate Seow's evidence in its totality and to detect the lack of substance in the allegations made by UEM.

[44] I now come to the misdirection in law. The learned judge when applying s 131 had regard to its letter and not its intention. His direction upon the construction of s 131 is against the line of authority that has interpreted the section. In *Woolworths Ltd v Kelly* (1991) 4 ACSR 431, the New South Wales Court of Appeal had to consider the equipollent s 123 of the Australian statute. It was held that the Australian provision – and the same is true of our s 131 — does not require a formal declaration of a director's interest at a meeting. Neither does the section require a disclosure of relevant facts to persons wholly aware of them, provided of course that the directors fulfilled their fiduciary obligations. Samuels JA said:

> It is true, of course, that s 123 does not merely provide for disclosure but requires the interested director to 'declare the nature of his interest'; and, as I have pointed out, sub-s (7) provides that the secretary of the company 'shall record every declaration under this section in the minutes of the meeting at which it was made'. However, notwithstanding that this language contemplates some formality, I do not think it has the effect of requiring disclosure of facts to those who are plainly wholly aware of them.

[45] Unfortunately, the learned judge did not address his mind to the decision in *Woolworths Ltd v Kelly*. Neither did he discuss *Lee Panavision Ltd v Lee Lighting Ltd* [1992] BCLC 22 which is an English case to the same effect as *Woolworths Ltd v Kelly*. The learned judge's approach to the construction of s 131 therefore constitutes a misdirection in law.

(vi) The inter-company arrangement

[46] It is common ground that this arrangement existed since UEG's incorporation. According to the oral and documentary evidence, this arrangement worked as follows. UEG paid for materials purchased by GIE in Malaysia. It then added a service charge of 3% to the cost and debited the sum against GIE's account with UEG. Similarly, GIE made payments for UEG in Singapore. These transactions were set off against each other by means of a contra account. The undisputed documents not only show that UEG's board was aware and acquiesced in this inter-company arrangement: they also show a similar arrangement between UEM and UEG. The documentary evidence placed before the High Court also shows (i) that UEG owes GIE a sum of about RM2m in respect of the inter-company transactions between them and (ii) that UEM owes UEG a sum of RM8,572,988.65 as of 31 August 2000 in respect of the inter-company transactions between them. In the face of the stark documentary material before him, the learned judge came to the following conclusion:

[55] UEM's contention here is that Seow and GIE led management of UEG abused their position and used the funds of UEG to make payment on behalf of GIE. UEM alleged that Seow and GIE led management of UEG effectively used a system of alleged 'inter-company' payments to defraud and siphon money out of UEG for their own benefit, without any board's resolution. In short, UEM claimed that the 'inter-company payment arrangement' is a device which was created by Seow and used by him for his own benefit.

In his testimony in court, Seow admitted that the following payments on behalf of GIE were made by UEG:

(a) legal fees to Messrs Zaid Ibrahim & Co for services rendered GIE;

(b) legal fees to Christina Rani for services which she rendered to GIE;

(c) moneys expended on Messrs Don Ho & Associates, valuers appointed in respect of a dispute which Seow had with his partners in GIE.

[56] Seow was shown a document (at p 113 of encl 50B) which he agreed was a UEG document reflecting 'inter-company' transactions with GIE as at 31 December 2000 which shows that there was an amount due from GIE to UEG in the sum of RM515,217.56. Seow also agreed that the 'inter-company' listing in encl 39, showed a net amount due from UEG to GIE in the sum of RM44,360.53. In relation to this, Seow admitted that in his meetings with UEG's auditors, Messrs Ernst & Young he did not draw their attention to the existence of the 'inter-company' accounts. Seow also made a significant admission on his testimony (see: Notes of proceedings at p 50 dated 17 March 2001) when he confirmed that he did not table the 'inter-company' accounts before the board of directors of UEG for their approval.

[57] It should be noted that Seow's most significant and damaging admission is that he was unable to confirm whether GIE had repaid UEG for the moneys which UEG has expended in respect of GlE's matters. Similarly, Seow was unable to confirm whether GIE had repaid UEG for the items pleaded in this petition (D3 Suit). The brazenly and arrogant attitude of Seow is exemplified by his response that there was no need to make any attempt to verify whether UEG was reimbursed for the moneys it was expending on behalf of GIE (see: p 86 — notes of proceedings dated 17 June 2004). Seow agreed that he received several written objections from directors of UEG nominated by UEM to this 'inter-company' arrangement, but despite these objections he continued with it (see: pp 88–90 of notes of proceedings dated 17 June 2004).

[58] From the evidence, the court is of the view that the 'inter-company' payment system instituted by Seow was designed to circumvent the system of joint approval of payments which was in place in UEG. Under the system in UEG, payments above a specified amount could only be made with signatures from both signatories nominated by UEM and GIE. However, under the 'inter-company' device, a purchase could be affected by GIE upon receipt of a requisition from UEG, which need not be signed by the directors of UEG nominated by UEM.

[47] You will see that the learned judge was highly critical of GIE and Seow. But he appears to have completely overlooked UEM's own participation in the inter-company transactions. If he thought GIE's conduct to be reprehensible he should have passed the same comment in respect of UEM. He did not. And this despite UEM owing UEG a large sum of money. This duality of approach to the evaluation of the evidence constitutes a serious misdirection resulting in a miscarriage of justice. It warrants appellate interference.

(viii) Management lacking probity

[48] Two points were made here by UEM and accepted by the learned judge. First, that UEG's account for the year ending 31 December 1998 had not been audited; second, that UEM was denied access to UEG's accounting documents. But the evidence does not bear this out. Indeed, the evidence of the accountant Tan Soo Yan supports UIG's case that arrangements were made for the auditors to commence their audit around the third week of July 2000 and Germaine Tan who took over from Azni Amran after his suspension on 6 September 2000 continued to assist the auditor. The position is summed up in the following answer given by Seow under cross-examination — an answer ignored by the learned judge without assigning reasons:

This draft audited account was prepared on 13 April 2001, as can be seen on the top right hand corner, 'Draft, 13 April 2001'. The losses which the auditors have provided under the draft accounts were mainly provisions for bad debts which the auditors felt the company was not able to collect. They were mainly provisions for bad debts. Bad debts owing from Faber group projects, further provisions for Faber Group projects, under UEM Group; provisions for bad debts for main contractors who were under s 176 restructuring and, I believe provisions for anticipated losses on the Telekom Project of which UEG was a subcontractor of UEM and I believe also, provision for liquidated and accident [ascertained] damages which UEM had threatened that they will impose on UEG, and a further three million over ringgit for a project called Wakaf College which was undertaken by UEG for one of

A UEM's subsidiary companies for which UEG were unable to collect for more than three years. So, these were all just provisions for bad debts.

[49] When you view the accounts objectively, you will see that UEG was in a financially straitened position principally because of monies owed to it by UEM's subsidiaries and its group of companies. Yet, UEM placed the blame for UEG's financial position entirely on UIG and the learned judge accepted that to be the case without a proper appreciation of the evidence. Hence the learned judge's finding that Seow conducted the management of UEG's financial affairs in a manner wholly lacking probity cannot stand in the light of independent contemporaneous documentary evidence and is against the probabilities of the case.

OVERVIEW

[50] Taking a step back and looking at the UEG story as a whole this is the objective perspective. UEM and UIG came together and formed UEG to exploit the opportunities that the construction industry had to offer in terms of mechanical and electrical engineering works. The relationship between the UEM and UIG nominated directors was cordial from the outset. Decisions were sometimes taken informally because what must have appeared important to the parties was securing work and making UEG a success: not the tying of red tapes in the running of UEG. In the meantime, the UEM nominated directors on UEG's board kept changing from time to time. Then came the global financial crisis of 1997. It affected Malaysia as well. UEM decided to rid itself of UEG. An attempt to effect a sale of its shares to Nova Nusantara in violation of the shareholders agreement did not materialise. Neither did the attempt to sell out to UIG which took the view that though a joint venture partner of UEM, the latter was treating it less fairly than Nova Nusantara. In the course of the protracted negotiations the relationship between the joint adventurers deteriorated to such a level that legal proceedings were instituted. It was at that stage — very late in the day — that UEM began to accuse UIG of the several acts of oppression that formed the basis of UEM's petition.

[51] Taking into account the whole of the evidence, including the undisputed contemporaneous documents, it is my considered judgment that none of the grounds of complaint raised by UEM and dealt with by the High Court were substantiated. UEM had therefore failed to establish a case of oppression under s 181 of the Act. Accordingly the learned judge ought to have dismissed its petition.

THE GIE PETITION

[52] The GIE petition is based on those matters that transpired after UEM's decision to withdraw from the joint venture. The main grounds of complaint are, first, that UEM acted in breach of the shareholders agreement by dealing with Nova Nusantara and second that UEM starved UEG of funds. Taking the first ground, it is significant that once GIE drew UEM's attention to the pre-emption clause, UEM withdrew from the negotiations with Nova Nusantara and offered to sell its stake in UEG to GIE. True that the price and terms were different. But there were protracted negotiations on these. What GIE could have done but did not do was to suggest the immediate valuation of the UEG shares on a net asset worth basis and proceeded from there. That did not happen. As for starving UEG, this is a matter in respect of which was open for UEG to institute proceedings against UEM and its relevant subsidiaries to recover monies admittedly due to it. Such proceedings could have been initiated by solicitors acting on Seow's instructions as UEG's managing director. But these are not matters that constitute grounds for moving a petition under s 181 of the Act. I would therefore, for reasons different from those given by the learned judge, uphold his decision to dismiss GIE's petition.

[53] Before concluding, I must mention that at the commencement of the proceedings in the court below, the parties had agreed that the party which succeeded in its case should purchase the unsuccessful party's shares. Although he found for UEM the learned judge instead of addressing the agreement reached by the parties ordered UEG to be wound up. I refrain from making any further comment on this part of the case in view of my conclusion that his finding in UEM's favour was in error. But this is a matter that must be dealt with. I shall do so in a moment.

THE RESULT

[54] The upshot is as follows. GIE's appeal in respect of the UEM petition, that is to say Petition No D3-26–29 of 2001 is allowed. The said petition is dismissed. The orders of the High Court are set aside. The liquidator appointed pursuant to the order to wind up is hereby forthwith discharged. The executive authority of UEG is hereby re-vested in its board. Seow is restored to his position as the CEO of UEG. It is hereby directed that the liquidator forthwith hand over all documents and other materials in his possession pertaining to UEG to Seow. The order dismissing the GIE petition, that is to say Petition No D5(D9)-26–43 of 2000 is hereby affirmed. The parties and the liquidator are at liberty generally to apply to the High Court on the carriage of the orders made herein.

[55] Now for the agreement I referred to a moment ago. It is that the successful party should purchase the unsuccessful party's shares. The result here is that both parties have failed in their respective petitions. The agreement therefore no longer bites and the case must be dealt with in the ordinary way as if there had been no agreement.

[56] Argument is now invited on costs and the orders, if any, that the parties require to be made consequent upon the orders made in this judgment.

[57] My learned brother Hasan bin Lah JCA has seen this judgment in draft and has expressed his agreement with it.

Zainun Ali JCA:

[58] I am in complete agreement with the above judgment of my learned brother Gopal Sri Ram JCA. However, I wish to add a very brief view on the question of sanctity of the bargain between shareholders, as embodied in the articles and agreements between them. This relates to the issue of pre-emption provisions; the balance between granting that right or remedy or allowing it to be an instrument of abuse; and how fairness can be attained in the event of its violation.

[59] The parties' pre-emption provisions are found in cl 12.3 of the shareholders agreement. Under this clause, a member intending to transfer his shares, should offer them first to the existing members.

[60] It is in cl 12.3 of the shareholders agreement that UEM found itself standing on the wrong foot.

[61] Clause 12.3 is basically a pre-emption clause which in clear terms state that UEM should have, but did not, first offer its shares in UEG to GIE.

[62] Instead, UEM made the first offer of its shares in UEG to a third party, Nova Nusantara. This type of breach, ie a breach of a pre-emption article requiring a member intending to transfer his shares to offer them first to the existing members, has been a frequent source of dispute and even litigation.

[63] The simple reason is that the existing members will be keen to enforce its terms so as to acquire the transferor's shares at the favourable price set in the articles (usually by applying the mechanism of an independent valuation) or to stop the shares from being transferred to outsiders.

[64] However, in cases such as *Theakston v London Trust plc* [1984] BCLC 390, *Re Scotts Trustees* [1959] AC 763 at p 778, *Safeguard Industrial Investments Ltd v National Westminster Bank Ltd* [1980] 3 All ER 849 it is seen that courts will be slow to find that the pre-emption provisions have been triggered in the absence of proof of an unequivocal intention on the part of a share transferor to transfer, such as the execution of a share transfer or his entry into a contractual obligation to execute and deliver a transfer in violation of the rights of pre-emption.

[65] However, if there has been a breach of the pre-emption provisions obviously a shareholder entitled to those pre-emption benefits, has a cause of action to protect his interest, whether by way of a rectification of the register or by other means. The articles will usually provide that any transfer other than in accordance with the pre-emption provisions is prohibited, as is clear in this appeal.

[66] In the case of *Tett v Phoenix* [1984] BCLC 599, the facts are simple enough. A shareholder had died and her executors sold the shares to a third party, in breach of the pre-emption provisions. The directors refused to register the transfer. Vinelott J, in considering the facts and that of the case of *Hunter v Hunter* [1936] AC 222 in which the courts below took the view that a transfer to a bank with notice of the pre-emption provisions was inoperative, held that the member's rights under the articles matured into a beneficial interest in the shares subject to the pre-emption provisions. His Lordship observed that:

> … The other member's rights to require (deceased)'s executors to offer the shares to them before transferring them to the plaintiff matured into an option to purchase the shares at the fair value to be determined by the auditors when the transfers were executed and that, that option created an equitable interest prior in time to the interest taken by the plaintiff under the transfer. Until registration the equitable interest of the other members in the share would prevail over the subsequent interest of the plaintiff whether the members had notice of his interest or not. [*Roots v Williamson* (1888) 38 Ch D 485]. After the registration of the plaintiff as the holder of the shares in question the priority of the option would depend on whether the plaintiff had notice, actual or constructive that the pre-emption provisions had not been complied with at the time when the transfer was executed.

[67] So in the appeal before us, UEM had not only acted in breach of the pre-emption provisions, it went a step further by asking GIE to waive those rights under the shareholders agreement. Even after GIE expressed its willingness to be offered the shares on the same terms as that offered to Nova Nusantara, UEM resisted them. Instead, UEM offered GIE the shares on much less favourable terms.

A **[68]** Clearly, UEM had treated its joint partner (GIE) a lot less fairly than it did a third party (Nova Nusantara). That their relationship subsequently went on a downhill slide came as no surprise, leading to legal proceedings being instituted with UEM accusing GIE of several acts of oppression, which lies at the heart of UEM's case against GIE.

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Appeal allowed.

Reported by K Nesan

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